

STATE OF MICHIGAN
COURT OF APPEALS

ETOY MUNSALINA FORD and JESSNAK
VARICE, Next Friends and Co-Personal
Representatives of the Estate of JAVONTAE
FORD, Deceased,

Plaintiffs-Appellees,

v

FRANCIS M. BANASZAK, BANASZAK
BUILDERS, INC., and PAUL VALLAD,

Defendants,

and

ROBERT W. VALLINA, DOUGLAS W.
BRADLEY, GERI SLAVIN, ROBERT IRWIN,
and PATRICK OGG,

Defendants-Appellants.

UNPUBLISHED

July 14, 2005

No. 254108

Oakland Circuit Court

LC No. 2003-051562-NO

Before: Neff, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendants-appellants, each of whom are employed by Waterford Township (hereinafter the “township defendants”), appeal as of right from the trial court’s order denying their motion for summary disposition based on governmental immunity, MCR 2.116(C)(7). We reverse.

This action arises from the drowning death of plaintiffs’ seven-year-old decedent in a swimming pool on private property owned by Banaszak Builders, Inc. Plaintiffs allege that the township defendants were grossly negligent by failing to take action to remediate the condition of the property and swimming pool before the child drowned, despite having received neighborhood complaints about the hazardous condition of the property.¹ The township

¹ Defendant Robert Vallina is the township director of community planning and development,
(continued...)

defendants moved for summary disposition under MCR 2.116(C)(7), arguing that they were governmentally immune from liability. The trial court denied their motion.

A trial court's decision concerning a motion for summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In reviewing a motion under MCR 2.116(C)(7) based on governmental immunity, a court must accept all well pleaded allegations as true, unless contradicted by other evidence, and construe them in favor of the nonmoving party. *Id.* at 119. The court must consider any affidavits, depositions, admissions, or other documentary evidence submitted by the parties, to determine whether a genuine issue of material fact exists. MCR 2.116(G)(5); *Maiden, supra* at 119.

At the time of the decedent's death, MCL 691.1407(2) provided:

(2) *Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:*

(a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is *acting within the scope of his or her authority*.

(b) The governmental agency is engaged in the *exercise or discharge of a governmental function*.

(c) *The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.* As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. [Emphasis added.]

The township defendants argue that liability cannot be based upon their failure to enforce an ordinance and, therefore, the trial court erred in denying their motion for summary disposition. We agree that government agencies and municipalities ordinarily cannot be held liable for failure or refusal to enforce an ordinance.² See *Scheurman v Dep't of Transportation*, 434 Mich 619, 634-635; 456 NW2d 66 (1990); *Epperson v Crawford Co Rd Comm*, 196 Mich

(...continued)

defendant Douglas Bradley is the township director of building and engineering, defendants Robert Irwin and Patrick Ogg are both code enforcement officers for the township, and defendant Geri Slavin is the lead code enforcement officer for the township.

² Under MCL 691.1407(1), "a governmental agency is immune from tort liability if the agency is engaged in the exercise or discharge of a governmental function."

App 164, 167; 492 NW2d 455 (1992); *Randall v Delta Charter Twp*, 121 Mich App 26, 31; 328 NW2d 562 (1982). Additionally, the failure to enforce an ordinance is not an intentional tort. *Randall, supra* at 33-34. We are not persuaded, however, that a government employee's failure to perform a duty in the course of his or her employment cannot give rise to a finding of gross negligence as a matter of law. See, e.g., *Tallman v Markstrom*, 180 Mich App 141, 143-144; 446 NW2d 618 (1989).

Nonetheless, we conclude that the township defendants were entitled to summary disposition on the basis that their alleged conduct was not "the proximate cause" of the child's death.

The parties do not dispute that the township defendants are entitled to immunity under MCL 691.1407(2), provided their conduct did not "amount to gross negligence that is *the proximate cause* of the injury or damage." The phrase "the proximate cause" as used in MCL 691.1407(2)(c) "means the one most immediate, efficient, and direct cause preceding an injury, not 'a proximate cause.'" *Robinson v Detroit*, 462 Mich 439, 445-446; 613 NW2d 307 (2000). Here, the one most immediate, efficient, and direct cause of the child's death was the property owner's failure to secure and maintain the property. Indeed, we agree with the trial court's determination that "the homeowner's negligence in failing to maintain the fence surrounding the pool would seem to be a more direct cause of the drowning than the township officers' failure to enforce code requirements relating to fence maintenance." Therefore, to the extent that the township defendants' could be deemed to have been grossly negligent, they are immune from liability as a matter of law because their conduct was not "the" proximate cause of the child's drowning death.

Plaintiffs' reliance on *Dean v Childs*, 262 Mich App 48; 684 NW2d 894 (2004), is misplaced because that case is factually distinguishable. In *Dean*, the government defendant engaged in affirmative acts that increased the risk of harm to the plaintiff's decedents. No such conduct is alleged in this case.

We, therefore, hold that the trial court erred in denying the township defendants' motion for summary disposition. In light of our decision, we need not address the township defendants' remaining arguments on appeal.

Reversed.

/s/ Janet T. Neff

/s/ Michael R. Smolenski

/s/ Michael J. Talbot